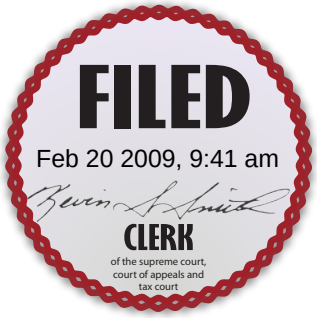

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IN THE
COURT OF APPEALS OF INDIANA

STATE OF INDIANA,	)	
	)	
Appellant-Plaintiff,	)	
	)	
vs.	)	No. 49A02-0808-CR-772
	)	
JOSEPH COLEMAN,	)	
	)	
Appellee-Defendant.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Reuben Hill, Judge
Cause No. 49F18-0104-DF-94176

February 20, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

DARDEN, Judge

STATEMENT OF THE CASE

The State appeals the trial court's March 3, 2008 order modifying to a class A misdemeanor Joseph Coleman's January 23, 2002 conviction of resisting law enforcement, as a class D felony to a class A misdemeanor.

We reverse.

ISSUE

Whether the trial court had authority to issue its order of modification.

FACTS

On April 27, 2001, the State charged Coleman with Count I, battery with injury on a police officer, a class D felony; Count II, resisting law enforcement by force with bodily injury, a class D felony; and Count III, resisting law enforcement as a class A misdemeanor. On January 23, 2002, Coleman tendered to the trial court his plea agreement with the State whereby he agreed to plead guilty to Count II, resisting law enforcement as a class D felony, and the State agreed to dismiss the other two counts. The plea agreement specified that with respect to sentencing, the State would recommend as follows:

> Open to argument for misdemeanor sentencing
> 365 d. cap of 180 d. executed (open to placement)
> Suspended portion of sentence on probation
> 40 hours of CSW
> Letter of apology to Officer Michael Nichols, MCSD (N****)
> F/C to Court's discretion.

(App. 19). After establishing the factual basis, the trial court accepted the guilty plea and entered judgment of conviction, as a class D felony, on January 23, 2002. The trial court

imposed a sentence of 365 days, with 30 days executed and 335 days suspended to probation; however, there was no discussion or argument as to alternative misdemeanor sentencing.

Approximately two months later, on March 18, 2002, the probation department filed notice alleging that Coleman had failed to report for his intake interview, and a warrant was issued for his arrest. On August 28, 2002, the probation department filed a petition requesting that "substance abuse evaluation/treatment" be added as "a special condition of probation," based on Coleman's positive drug tests and with his agreement. (App. 25). The trial court so ordered. On March 10, 2003, the probation department filed notice alleging that Coleman failed to report for substance abuse evaluation/treatment, had not reported to probation since November 13, 2002, and failed to pay probation fees. Another warrant was issued for his arrest. On August 29, 2003, a probation violation hearing was held. The trial court revoked Coleman's probation and ordered him to serve 240 days[1] at the Department of Correction.

On June 27, 2007, Coleman filed a "Motion to Modify Class D Felony Conviction to Alternate Misdemeanor Sentence." (App. 27). His motion noted that on March 5, 2007, Coleman

> was arrested and charged with the crimes of Driving While License Suspended with a Prior, as a Class A Misdemeanor and Carrying a Handgun Without a License, as a Class A Misdemeanor, which was elevated to a Class C felony as a result of his prior Class D felony conviction in this cause.

[1] Both from the bench and in its written order, the trial court specified that 60 days of his sentence was for Coleman's having lied to the trial court at the probation revocation hearing. (App. 53, 94).

(App. 28-29). Coleman moved that his January 23, 2002, conviction be "modified to a Misdemeanor sentence," so that his current charge of carrying a handgun without a license would not "be elevated from" a class A misdemeanor to a class C felony. (App. 30, 29). After an out-of-court hearing, in which the State opposed modification, the trial court granted Coleman's motion on March 3, 2008.

The State filed a motion to correct error on April 2, 2008, arguing that the trial court erred because it lacked authority to modify the conviction to a class A misdemeanor. Coleman filed a response. The trial court held a hearing on the State's motion on May 2, 2008, and took the matter under advisement. On May 30, 2008, the State filed a request for a ruling. No ruling was forthcoming, and the motion was deemed denied on June 2, 2008. *See* Ind. Trial Rule 53.3(A). The State then filed this appeal.

DECISION

Sentencing decisions rest within the sound discretion of the trial court and are reviewed only for an abuse of discretion. *Anglemyer v. State*, 868 N.E.2d 482, 490 (Ind. 2007), *clarified on reh'g on other grounds*, 875 N.E.2d 218 (Ind. 2007). "With very little exception, the trial court has no authority over a defendant after it has pronounced sentence." *Dier v. State*, 524 N.E.2d 789, 790 (Ind. 1988) ("no authority for a trial court to reopen a sentencing almost five years after its imposition and . . . change" it). "Any continuing jurisdiction after final judgment has been pronounced must either derive from the judgment itself or be granted to the court by statute or rule." *State v. Fulkrod*, 735 N.E.2d 851, 852 (Ind. Ct. App. 2000) (citing *Schweitzer v. State*, 700 N.E.2d 488, 492 (Ind. Ct. App. 1998), *trans. denied*), *aff'd*. 753 N.E.2d 630, 633 (Ind. 2001) ("trial court

lacked authority to modify Fulkrod's sentence"); *see also Beanblossom v. State*, 637 N.E.2d 1345, 1347 (Ind. Ct. App. 1994) (citing *Marts v. State*, 478 N.E.2d 63 (Ind. 1985)), *trans. denied*.

Fulkrod was sentenced on September 21, 1994, for voluntary manslaughter, and on May 26, 1999, Fulkrod filed a petition for modification of sentence. After a hearing, the trial court entered an order modifying sentence. The State appealed, arguing that the trial court erred because it no longer had jurisdiction over Fulkrod's case. We found the "controlling authority" to be Indiana Code section 35-38-1-17, and held that because "more than 365 days had expired from the date Fulkrod began to serve his sentence to the date he filed" his petition for modification, "and the prosecutor refused to grant his approval to the sentence modification,"[2] the trial court "lacked jurisdiction to modify Fulkrod's sentence." *Id.* at 854.

Here, Coleman was sentenced on January 23, 2002, after having been convicted of a class D felony. On June 27, 2007, more than five years after sentencing and almost four years after revocation of his probation and sentencing to DOC, Coleman moved to modify his class D felony conviction to a class A misdemeanor. The trial court entered its order of modification, over the State's objection, on March 3, 2008, which was six years after Coleman began serving his sentence and four-and-a-half years after his

[2] *Fulkrod* noted that I.C. § 35-38-1-17(a) provided that if within 365 days of the defendant's beginning to serve his sentence, there was a hearing at which the prosecuting attorney was present, and a report had been obtained from DOC regarding the defendant's conduct during imprisonment, the court could "reduce or suspend the sentence," with the reasons therefor incorporated in the record. 735 N.E.2d at 853-54. Further, I.C. § 35-38-1-17(b) provided that if more than 365 days had elapsed since the defendant had begun to serve his sentence, the court could "reduce or suspend the sentence, subject to the approval of the prosecuting attorney." *Id.*

These provisions remain part of I.C. § 35-38-1-17.

probation was revoked and he was sentenced to DOC to serve his sentence. Therefore, like in *Fulkrod*, because "more than 365 days had expired from the day [Coleman] began to serve his sentence to the day he filed" his motion for modification, without the State agreeing to the modification, the trial court lacked jurisdiction to modify Coleman's sentence. *Id.*

At the hearing on the State's motion to correct error, Coleman argued that Indiana Code 35-38-1-1.5 allowed for alternate misdemeanor sentencing in his case. That statute provides in pertinent part as follows:

> (a) A court may enter judgment of conviction as a Class D felony with the express provision that the conviction will be converted to a conviction as a Class A misdemeanor within three (3) years if the person fulfills certain conditions. A court may enter a judgment of conviction as a Class D felony with the express provision that the conviction will be converted to a conviction as a Class A misdemeanor only if the person pleads guilty to a Class D felony that qualifies for consideration as a Class A misdemeanor under IC 35-50-2-7, and the following conditions are met:
>
> (1) The prosecuting attorney consents.
>
> (2) The person agrees to the conditions set by the court.
>
> (b) For a judgment of conviction to be entered under subsection (a), the court, the prosecuting attorney, and the person must all agree to the conditions set by the court under subsection (a).
>
> (c) The court is not required to convert a judgment of conviction entered as a Class A misdemeanor if, after a hearing, the court finds:
>
> (1) the person has violated a condition set by the court under subsection (a); or
>
> (2) the period that the conditions set by the court under subsection (a) are in effect expires before the person successfully completes each condition.
>
> However, the court may not convert a judgment of conviction entered as a Class D felony to a Class A misdemeanor if the person commits a new offense before the conditions set by the court under subsection (a) expires.
>
> (d) The court shall enter judgment of conviction as a Class A misdemeanor if the person fulfills the conditions set by the court under subsection (a).

I.C. § 35-38-1-1.5.

First, as the State notes, Indiana Code section 35-38-1-17, addressing the conversion of a class D felony conviction, was not enacted until 2003, more than a year after Coleman's conviction and sentencing. *See* P.L. 98-2003 § 2. Moreover, the statute provides for "conver[sion] to a conviction as a Class A misdemeanor" within three years. I.C. § 35-38-1-1.5(a). The conversion here was entered more than six years after the judgment. Further, the statute provides for a conversion when a "judgment of conviction as a Class D felony" is entered with the expectation that certain "express provision[s]" will be fulfilled by the person convicted. *Id.* No such express provision is found in the trial court's judgment of Coleman's conviction. In addition, the statute requires that conversion must be approved by and consented to by the prosecuting attorney. Here, the State expressed its objection to the conversion.

At the hearing on the motion to correct error, and in his appellate brief, Coleman argued that the State's consent was manifested in the initial plea agreement, expressing therein the State's consent to possible alternative misdemeanor sentencing. We cannot agree. The language "open to argument for misdemeanor sentencing" clearly contemplates that the State could oppose alternative misdemeanor sentencing. Further, we find no authority for the proposition that the State's agreement to Coleman's "argument for alternative misdemeanor sentencing" could extend indefinitely the trial court's jurisdiction to modify its judgment of conviction. Such is contrary to the principle that any continuing jurisdiction after final judgment has been pronounced must derive from the judgment itself or be granted to the court by statute or rule. *Fulkrod*, 735 N.E.2d at 852.

Finally, we are unpersuaded by Coleman's request that we apply "the concepts within I.C. 35-38-1-1.5." Coleman's Br. at 5. That provision, enacted in 2003 and containing a three-year time limitation, appears to authorize the trial court to modify the sentence of a person convicted of a class D felony in order to recognize the accomplishment of the person in fulfilling express court-ordered conditions – conditions that we assume would demand particularly meritorious behavior. It would be contrary to the intent and spirit of the statute to extend its application to a petitioner who had failed to complete probation, especially when he has been charged with additional crimes more than five years after having been convicted and sentenced.

Reversed.

RILEY, J., and VAIDIK, J., concur.